92-1076

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

Petitioner/Appellant,

v.

DOUGLAS KINGSBURY,

Respondent/Appellee.

Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it a violation of United States Constitution amendments IV and XIV, and thus an unreasonable search and seizure, for law enforcement officers to stop a vehicle which, in their presence, is driven in violation of state traffic laws and whose driver makes furtive motions as he passes a sign announcing a narcotics checkpoint?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Reasonable Suspicion for a *Terry* Stop 5

B. Law Violations Observed by the Officers 9

C. Meeting the Roadblock Standard 11

REASONS FOR GRANTING THE WRIT 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) 6

Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) 4, 5, 9

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 16

Michigan v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) 4, 5, 6, 9, 11, 14

State v. Anderson, 204 Neb. 186, 281 N.W.2d 743 (1979) 9

State v. Booth, 202 Neb. 692, 276 N.W.2d 673 (1979) 9

State v. Bowley, 232 Neb. 771, 442 N.W.2d 215 (1989) 10

State v. Ebberson, 209 Neb. 41, 305 N.W.2d 904 (1981) 6

State v. Ellington, 1 NCA 668 (1992) 9

State v. Erks, 214 Neb. 302, 333 N.W.2d 776 (1983) 8

State v. Everson, 474 N.W.2d 695 (N.D. 1991) .. 4, 8, 12

State v. Hoer, 231 Neb. 336, 436 N.W.2d 197 (1989) 9

State v. Kuil, 231 Neb. 62, 434 N.W.2d 700 (1989) 9

State v. Mahlin, 236 Neb. 818, 464 N.W.2d 312 (1991) 6

State v. Nowicki, 209 Neb. 640, 305 N.W.2d 89 (1981) 6

TABLE OF AUTHORITIES – Continued

Page

State v. Olaiz, 100 Or. App. 380, 786 P.2d 734 (1990) 6, 7

State v. Ryland, 241 Neb. 74, ___ N.W.2d ___ (1992) 6

State v. Stevenson and Jackson, 200 Neb. 624, 264 N.W.2d 848 (1978) 8

State v. Thill, 474 N.W.2d 86 (S.D. 1991) 7, 8

State v. Thomte, 226 Neb. 659, 413 N.W.2d 916 (1987) 10

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ..... *passim*

Thompson v. Reuting, 968 F.2d 756 (8th Cir. 1992) 8

United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) 5

United States v. Turpin, 920 F.2d 1377 (8th Cir. 1990) 8, 9

Wilson v. Gutschenritter, 185 Neb. 311, 175 N.W.2d 282 (1990) 8

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 1651 1

Neb.Rev.Stat. § 24-1106 (1991 Supp.) 14

Neb.Rev.Stat. § 29-404.02(2)(d) (Reissue 1989) 2, 10

Neb.Rev.Stat. § 29-824 (1991 Supp.) 3, 14

Neb.Rev.Stat. § 29-829 (Reissue 1989) 2

TABLE OF AUTHORITIES – Continued

Page

Neb.Rev.Stat. § 39-6,192 (1989 Supp.).....2, 9

Neb.Rev.Stat. § 39-631 (Reissue 1988)..... 2

Neb.Rev.Stat. § 39-669.21 (Reissue 1988)..... 2

Neb.Rev.Stat. § 81-2005(2) (1989 Supp.)..... 9

Neb.Rev.Stat. § 81-2005(2) (Reissue 1987)..... 2

MISCELLANEOUS

Nebraska Constitution Article I, § 7..... 15

United States Constitutional Amendments IV and XIV 1, 15

OPINIONS BELOW

The opinion of the Nebraska Court of Appeals is reported at 1 NCA 1337 (1992) and is reprinted in the Appendix hereto, App. 13-36, *infra*.

The opinion of the District Court of Lincoln County, Nebraska, has not been reported and is reprinted in the Appendix hereto, App. 1-12, *infra*.

The September 23, 1992, order of the Nebraska Supreme Court finding that it lacked jurisdiction to review the matter further is reprinted in the Appendix hereto. App. 37, *infra*.

JURISDICTION

The Judgement of the Nebraska Court of Appeals, affirming the Suppression Order entered by the District Court of Lincoln County, Nebraska, was entered on September 1, 1992. The Supreme Court of Nebraska ruled that it had no jurisdiction to review the matter further on September 23, 1992. That order is reprinted in the Appendix hereto, App. 37, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 and 1651.

STATUTES INVOLVED

The threshold Constitutional provisions to be considered are United States Constitutional Amendments IV and XIV and Nebraska Constitution Article I, § 7, all of which protect citizens from unreasonable searches and

seizures. The text of the provisions are set forth in the Appendix hereto, App. 38, *infra*.

In addition to the Constitutional provisions, a number of Nebraska state statutes apply. *Neb.Rev.Stat.* § 29-829 (Reissue 1989), following established case precedent, allows a police officer to stop any person in a public place whom the officer reasonably suspects of committing a crime and ask the person for identification and an explanation of his actions. *Neb.Rev.Stat.* § 29-404.02(2)(d) (Reissue 1989) allows the warrantless arrest of a person by an officer if the person commits a misdemeanor offense in the presence of the officer, and *Neb.Rev.Stat.* § 81-2005(2) (Reissue 1987) gives peace officers of the state the authority to make arrests "upon view and without warrant" for any traffic offense committed in their presence. Similarly, *Neb.Rev.Stat.* § 39-6,192 (1989 Supp.) specifically empowers law enforcement officers to enforce the Nebraska Rules of the Road. One of those rules is *Neb.Rev.Stat.* § 39-631 (Reissue 1988), which precludes operators of motor vehicles from driving on shoulders of highways, a misdemeanor per *Neb.Rev.Stat.* § 39-669.21 (Reissue 1988).

STATEMENT OF THE CASE

On December 6, 1991, an Information was filed in the District Court of Lincoln County, Nebraska, alleging that Douglas Kingsbury violated Nebraska law on October 24, 1991, by being in possession of cocaine. A motion to suppress the use of the cocaine as evidence against Mr. Kingsbury was filed on March 23, 1992 and sustained by

the District Court Judge on May 15, 1992. The Motion to Suppress raised the issue of whether the stop of Mr. Kingsbury had been accomplished in a manner permissible under the United States and Nebraska Constitutional prohibitions against unreasonable searches and seizures, and the Court in ordering suppression of the evidence found the search to be unconstitutionally violative of the Fourth Amendment of the United States Constitution.

An appeal was taken by the State to the Nebraska Court of Appeals, pursuant to *Neb.Rev.Stat.* § 29-824 (1991 Supp.), which affirmed the District Court's order in a one-judge opinion filed September 1, 1992. The Supreme Court of Nebraska, held that it lacks jurisdiction and declined to review the Court of Appeals decision in an Order dated September 23, 1992.

Mr. Kingsbury, an air traffic controller from Denver's Stapleton International Airport, was driving east on Interstate Highway 80 in Lincoln County, Nebraska, on October 24, 1991, when he passed two signs that had been set just off the shoulder of the road by officers of the Nebraska State Patrol. The first sign read "Narcotics Check Point, One Mile Ahead" and, one half mile later, the second sign stated "Check Point Ahead Be Prepared To Stop." In actuality there was no checkpoint; police officers with binoculars were stationed along the side of the road observing the reactions of drivers as they passed the signs, and other officers further down the road were then pulling over only those vehicles that were observed to commit law violations, take evasive actions to avoid the "checkpoint", or contain occupants who made furtive motions upon passing by the signs. The officers who pulled the vehicles over received radio transmissions

from those who made the initial observations so as to be sure to stop the correct vehicle.

As Mr. Kingsbury passed the signs, his car was observed to dramatically slow, weave within its lane, and drive upon the shoulder of the roadway. Mr. Kingsbury, the driver and sole occupant, was seen to be pushing something under the passenger seat of the vehicle. He was stopped, and in plain view on the floor of the vehicle was observed a quantity of cocaine. Mr. Kingbury was jailed for suspicion of possessing a controlled substance. The drug was seized by the officers and became the subject of the suppression motion.

The Lincoln County District Court and the Court of Appeals erroneously analogized the "check point" involved in this case to those in such cases as *Michigan v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), and *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), which it clearly was not.

Checkpoints and/or roadblocks as defined in those cases involve the stopping of *all* vehicles (or each fourth vehicle, for example) even though there exists no reasonable suspicion or probable cause for believing any criminal activity was taking place. The "checkpoint/ roadblock" which is the subject of the present matter – and the specific stop of Kingsbury's vehicle – is just the opposite situation: *only* those vehicle occupants exhibiting some cause to believe criminal activity was afoot or those vehicles committing traffic violations were to be stopped.

For example, the stop in *Prouse* is easily and readily distinguished from the present facts. Mr. Prouse was stopped by an officer who had observed neither traffic or equipment violations or any suspicious activity and who was not acting pursuant to any standards or guidelines. Therefore his stop was unwarranted, the Court stating:

> . . . except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed . . . or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile . . . [is] unreasonable under the Fourth Amendment. 440 U.S. at 664, 99 S.Ct. at 1401.

In this framework, the proper questions to ask are (1) whether there was an articulable basis for suspecting Kingsbury of any criminal activity so as to justify a *Terry* stop; and/or (2) whether the law enforcement officers were justified in stopping the vehicle after it had committed any traffic violation.

A. Reasonable Suspicion for a *Terry* Stop.

The District Court of Lincoln County and Court of Appeals use the bulk of their opinions finding that the stop in this case did not meet the three-part test pronounced in *Michigan v. Sitz, supra*. However, the proper test is that enunciated in *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), which asks whether under the totality of the circumstances the officer had a specific and articulable suspicion of a possible law violation to justify an investigatory stop as defined by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889

(1968). *See also State v. Ryland*, 241 Neb. 74, ___ N.W.2d ___ (1992). As stated in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979):

> Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances include all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.

See also State v. Ebberson, 209 Neb. 41, 305 N.W.2d 904 (1981); *State v. Nowicki*, 209 Neb. 640, 305 N.W.2d 89 (1981); *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

The District Court in it's order of suppression completely failed to address the issue of a *Terry* stop, and the Court of Appeals allowed elements of the *Sitz* checkpoint analysis to infect its discussion of the *Terry* "reasonable suspicion" test (for example, intermingling "pre-text" and "unfettered discretion" remarks).

While this tribunal has never ruled on the propriety of pretextural stops of motor vehicles, the majority of state jurisdictions have held that pretext is irrelevant if the stop itself is legal. For example, in *State v. Olaiz*, 100 Or. App. 380, 786 P.2d 734 (1990), the Oregon Court of Appeals ruled that a traffic stop for speeding fifteen minutes after the violation was observed by narcotics officers who suspected that the defendant had just taken possession of narcotics was proper. A frisk of the suspect

revealed marijuana on his person, and a subsequent search of his vehicle turned up a quantity of drugs. The Court ruled the reason for the vehicle stop as irrelevant to admissibility of the evidence, stating "whether the officers would have stopped defendant for speeding (or a more serious infraction, had one occurred) without their desire to know more about the car's occupants is irrelevant . . . [they] were doing proper police work in a place where they had a right to be and were present when defendant committed a traffic infraction." 100 Or. App. at 386, 786 P.2d at 737.

Mr. Kingsbury's situation involves nothing more than a simple *Terry* stop based on reasonable suspicion, a position that is best illustrated through the case of *State v. Thill,* 474 N.W.2d 86 (S.D. 1991). In that case a roadblock was to be set up for all south bound traffic on a particular street in Sioux Falls, South Dakota. At a point approximately 350 feet north of the roadblock, a patrol car was stationed with red lights flashing, and Mr. Thill's vehicle was observed to make a left hand turn into a driveway at approximately the location of the patrol car, back out and proceed back in the direction from which it had come. It was followed by an officer who observed Thill make a two block detour before heading back in the direction he had originally been travelling. Thill was stopped, found to be intoxicated and eventually convicted of driving while intoxicated. It is crucial to note that on appeal the Supreme Court of South Dakota did not consider the validity of the roadblock itself, but instead concentrated on the single issue of whether or not the officer had reasonable cause to stop the vehicle. Citing *Terry v. Ohio,* and looking at the fact that Thill made "evasive motions",

the court found that the officer had specific articulable suspicion that Mr. Thill was in some way violating the law.

Similarly, in *United States v. Turpin*, 920 F.2d 1377 (8th Cir. 1990), a Mr. Williams came off an escalator at an airport to find himself facing a security checkpoint. He was observed to appear startled, then he abruptly turned around, ducked his head and proceeded back down the staircase on which he had arrived. In the belief that Williams might be carrying a weapon or narcotics, law enforcement officers followed him, eventually made contact with him, and placed him under arrest when a trained drug dog alerted to an unusual bulge in his clothing. Considering these facts in the context of the "totality of the circumstances" test and in light of the significance that the experienced law enforcement officer attached to them, the court found that specific and articulable facts existed to justify the stop.

Whether reasonable suspicion for a *Terry* stop exists is a question of law, *Thompson v. Reuting*, 968 F.2d 756 (8th Cir. 1992), *Wilson v. Gutschenritter*, 185 Neb. 311, 175 N.W.2d 282 (1990), and it was clear error to find that "reasonable suspicion" did not exist here. In effect, a phony roadblock was set up – signs announcing a nonexistent drug checkpoint were placed on the shoulder, and reactions of drivers were observed by trained and experienced law enforcement officers. (It should be noted that subterfuge with respect to the purpose of the roadblock does not invalidate it, *State v. Everson, supra*, and that subterfuge is an accepted method of police behaviors in other areas as well, e.g., *State v. Stevenson and Jackson*, 200 Neb. 624, 264 N.W.2d 848 (1978); *State v. Erks*, 214 Neb.

302, 333 N.W.2d 776 (1983)). When Kingsbury passed the signs, he was observed to slow, weave within his lane, drive on the shoulder and most significantly, attempt to push something under the passenger seat. This conduct is analogous to that in *Thill* and *Turpin, supra*. The item he hid was eventually found to be cocaine, and furtive gestures such as this may be considered by an officer in forming reasonable suspicion for a *Terry* stop. *See State v. Ellington*, 1 NCA 668 (1992); *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979).

In *State v. Anderson*, 204 Neb. 186, 193, 281 N.W.2d 743, 747 (1979), the Nebraska Supreme Court stated that "a police officer, is determining whether to make an investigative stop, is entitled to take into consideration deliberative furtive action of the person, including that which appears to have been occasioned by the suspect's awareness of the officer's presence."

These motions by Kingsbury, observed by trained and experienced law enforcement personnel, combined with the fact of signs announcing a "narcotics checkpoint" and the above-cited case law, clearly show that reasonable suspicion existed, and it is error to hold the State to the standards of *Sitz* and *Prouse, supra*.

B. Law Violations Observed by the Officers.

It is axiomatic that a law enforcement officer may stop a vehicle that is observed committing a traffic offense. *Neb.Rev.Stat.* §§ 81-2005(2), 39-6,192 (1989 Supp.), *State v. Hoer*, 231 Neb. 336, 436 N.W.2d 197 (1989), *State v. Kuil*, 231 Neb. 62, 434 N.W.2d 700 (1989), *Neb.Rev.Stat.*

§ 29-404.02(2)(d) (Reissue 1989). It has also been held that observing a vehicle weaving within its own lane provides an articulable basis for reasonable suspicion for stopping a vehicle to check on the driver's condition. *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987), *State v. Bowley*, 232 Neb. 771, 442 N.W.2d 215 (1989).

In the present matter, it is uncontroverted that Kingsbury's vehicle, after passing at least one of the checkpoint signs and observation posts, was observed by at least two law enforcement officers to drive on the shoulder of the Interstate 80 roadway, which is a law violation in Nebraska. Also, at the same time his vehicle was observed to slow down "considerably" to approximately 45 mph and weave erratically within its own lane. Based on these facts alone the stop of Kingsbury's vehicle was proper, thus making it error as a matter of law for the district court to sustain the suppression motion and the Court of Appeals to affirm that order.

The Court of Appeals appears to give great weight to what is seen as an inconsistency in testimony, as only three of six officers who testified saw any furtive motions, weaving, slowing down and/or driving onto the shoulder. 1 NCA at 1352. However, the Court failed to take into account evidence of the diagram of the scene (Exhibit 1; App. 39-42 *infra*) and the testimony of the three officers who observed nothing; Officers Parker and Carmichael were at the point where cars were actually being stopped, over and down the hill from Officers Leonard, Eng and Rice, and therefore could not have seen Kingsbury's car until it crested the hill by the rest area, well beyond the point where he had slowed, weaved, driven onto the shoulder and pushed his cocaine under

the front seat. Their job was to pull cars over, not observe any of the driver's reactions to the signs. Those activities were seen and described in consistent detail by Officers Leonard, Eng and Rice, who were in the positions to best see them happen and were at the location for the specific purpose of making the observations.

The third officer who testified to not observing anything unusual about Kingsbury's vehicle, Officer Elliot, also testified that his job was to get broadcasts from the officers in the observation posts (Leonard, Eng, Rice, etc.) and make sure that the vehicle they saw was the same one pulled over farther down the road by Parker and Carmichael. It was not the job of Parker, Carmichael and Elliot to make observations; that job belonged to Leonard, Eng and Rice, all three of whom testified consistent with each other about what they saw. To characterize the testimony as "inconsistent" is clearly erroneous.

It is also crucial to note that, as the District Court made no *Terry* analysis, no factual findings were made on this issue.

C. Meeting the Roadblock Standard.

Even if the stop of Kingsbury's vehicle is deemed to have been done pursuant to a roadblock or checkpoint as defined by *Sitz, supra,* it is the State's contention that the three-part test set forth in *Sitz* necessary to justify such operations has been met.

The first necessary element, that being the showing of a "legitimate governmental interest of high importance" was found by both the trial court and the Court of Appeals to adequately have been shown by the State.

Regarding the second element, the showing of the effectiveness of the checkpoint, it is the State's position that, based on the comparable cases, very little is required to establish a "complete picture of effectiveness". For example, in *State v. Everson, supra,* only two controlled substance arrests were made out of 1,023 vehicle stops, a rate of only .196 percent, and this passed muster as being "effective". Similarly, only 1.5 percent of the drivers passing through the checkpoint in *Sitz* were arrested for alcohol impairment, yet this was also deemed to be sufficiently effective to justify the state's interest in implementing the program. It is the State's position that based on these incredible low percentages, the fact of Mr. Kingsbury being arrested pursuant to this operation, even without more, shows sufficient effectiveness to justify the program. It is hard to imagine a more justifiable activity than exposing a possessor of cocaine who serves in the important capacity of an air traffic controller, as does Mr. Kingsbury.

Also, as noted by the Appellate Court, effectiveness may also be shown by descriptive information regarding the degree to which the seizure advances the public interest. Again, besides the fact that this particular cocaine possessor is charged with the incredible responsibility of directing air traffic at a major international airport – and therefore his seizure advances the public interest – there was also uncontroverted evidence through testimony that

Interstate 80 is a "traffic way for narcotics". This depiction of Interstate 80 was not challenged in any way by the defense, and surely common sense dictates that a drug checkpoint along a major highway known for drug trafficking advances the public interest.

With regard to the final element, the level of intrusion on individual motorists, the Court of Appeals twice erroneously states that stops of vehicles in the present matter were made at the discretion of the officers. The protocol for the operation, admitted into evidence at the suppression hearing as Exhibit 1, gave no such discretion and mandated that the officers stop vehicles committing traffic violations, those containing occupants committing law violations, and those taking evasive action to avoid the checkpoint. For the Court of Appeals to consider this "arbitrary intrusion" was simply wrong. As a practical reality all the protocol did was authorize the officers to make *Terry* stops (which they were already lawfully authorized to make). It is of interest to note that the Court of Appeals must twice cite to dissenting opinions to justify its finding that the operation in the present case was overly intrusive on motorists, and in any event, because of the factors noted in parts A and B above, the stop of Mr. Kingsbury and others similarly situated cannot be considered unconstitutionally intrusive. As Kingsbury was stopped pursuant to an articulable reasonable suspicion of criminal activity per *Terry v. Ohio* and because he had committed a traffic infraction in the presence of the officers, the "intrusion" inherent in stopping his vehicle and contacting him is justified by the above cited case law and statutes.

REASONS FOR GRANTING THE WRIT

As set forth above, the Nebraska Court of Appeals decided the federal question of whether Douglas Kingsbury was unconstitutionally seized directly contrary to applicable decisions of this Court. The most glaring error was the failure to follow the rule of law first set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) which allows law enforcement officers to make investigatory stops of individuals in exactly the same types of factual situations that exist in this case. The Court of Appeals also erroneously held the state to the standard of review for checkpoints set forth in *Michigan v. Sitz*, 496 U.S. 444, 110 S.Ct. 2581, 110 L.Ed.2d 412 (1990) when in fact the Nebraska State Patrol had not set up a checkpoint at all analogous to the one in that case.

As contemplated by *Neb.Rev.Stat.* § 24-1106 (1991 Supp.), this case involves a novel legal question of significant public interest and, as noted in the opening paragraph of the Court of Appeals decision, a question of first impression in the State of Nebraska. That statute, read in conjunction with *Neb.Rev.Stat.* § 29-824 (1991 Supp.), effectively allows one judge of an inferior court the authority to issue final decisions based on federal constitutional law. Once an order of suppression has been upheld by one judge of the Court of Appeals, the State Supreme Court has no jurisdiction to review that decision until such time as trial is held on the District Court level, the evidence is again suppressed, and the State loses on the merits of the case. Yet, as there is no evidence for the prosecution to use against Mr. Kingsbury because of the District Court's suppression order, it would be futile and

unethical for the State to attempt further prosecution of Mr. Kingbury at this point in the proceedings.

An appropriate resolution of this matter would be for this Court to grant certiorari and either decide the case on the merits or remand to the Nebraska Supreme Court the question of whether or not the federal question was properly decided by the Nebraska Court of Appeals.

Petitioner feels obligated to point out to this tribunal that the decision of the Lincoln County District Court as well as the decision of the Nebraska Court of Appeals is at least arguably based in part on Nebraska Constitution Article I, § 7, the state counterpart to the Fourth Amendment of the United States Constitution. This would provide a basis independent of federal law for the decisions of these courts. However, as noted above, this case involves a question of first impression in the Nebraska Courts.

While the Court of Appeals makes a general statement that the search and seizure of Mr. Kingsbury's vehicle is "unacceptable under both the federal and state constitutions and that I need not address the issue of the identity of federal and state protections", 1 NCA at 1338, the only Nebraska authorities cited are the dissent from the majority opinion of a Fifth Amendment case and dicta from a concurring opinion stating the general rule that a state constitutional basis exists to determine the validity of a search and seizure. Two cases from different states are then cited, again for general propositions, before the recitation of the Court's opinion, which is based entirely on federal case law.

Thus the opinion of the Court of Appeals lacks the requisite "plain statement" that it rests on state grounds as contemplated by *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). As there is no adequate and independent state ground for the decision, the proper review of the Nebraska court's decision is under federal law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgement of the Court of Appeals of the State of Nebraska.

Respectfully submitted,

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IN THE DISTRICT COURT OF
LINCOLN COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, v. DOUGLAS KINGSBURY, Defendant.	)	CASE NO. 105-25 ORDER (Filed May 12, 1992)

> "It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials: "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinager v. United States*, 338 U.S. 160, 180, 69 S.Ct. 1302, 93 L.Ed. 1879 (Jackson, J., dissenting)." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273-274, 93 S.Ct. 2535, 37 L.Ed. 2d 596 (1973).

Since the decision in *Almeida-Sanchez*, the United State Supreme Court has had consistently hewed to the line that warrantless seizures of vehicles, not based on articulable standards of suspicion, violated the Constitution of the United States. *Almeida-Sanchez* prohibited the seizure and subsequent search of vehicles by roving patrols near the area of the Mexican border absent a warrant or probable cause.

Please note: any misspellings throughout the appendix have intentionally been left that way to show how it actually appeared in the original document.

In *United States v. Bignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed. 2d 607 (1975), the Supreme Court followed its decision in *Almeida-Sanchez* and allowed border patrols to stop vehicles during roving patrols if "they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant that the vehicles contain aliens who may be illegally in the country." *Bignoni-Ponce*, 422 U.S. at 884. However, the court noted that Mexican ancestry standing alone would not allow such a warrantless seizure of the vehicle. Following *Bignoni-Ponce*, the Court later held "that stops for brief questioning routinely conducted at **permanent** checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566, 96 S.Ct. 3074, 49 L.Ed. 2d 1116 (1976) (Emphasis added).

Ultimately, the United States Supreme Court, in *Delaware v. Prouse*, 440 U.S. 658, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979), held that any random stop of a motorist, in the absence of specific articulable facts, was unconstitutional and violative of the Fourth Amendment.

> "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile

> than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio, supra,* recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. *Prouse,* 440 U.S. at 662-663.

The present United States Supreme Court edged back from the long line of cases recognizing the protection afforded motorists under the Fourth Amendment by its decision in *Michigan v. Sitz,* 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed. 2d 412 (1990). The court allowed the State of Michigan to conduct random checkpoints to determine the sobriety of the drivers stopped at such checkpoint. The Court's analysis indicated that the checkpoints were selected pursuant to guidelines and officers were required to stop every approaching vehicle. The intrusion involved was brief. Further, the Court, applying *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979), held that the reasonableness of a seizure in such circumstances "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers' ". *Brown,* 443 U.S. at 50. In upholding the constitutionality of sobriety checkpoints, the court specifically noted that the checkpoint in question stopped all vehicles and no discretion was left to the officer.

In the instant case, when applying the balancing test discussed above, the first determination to be made is whether or not a sufficient governmental interest exists which makes conducting a checkpoint a legitimate exercise of law enforcement.

The State, in the instant case, offered brief evidence that Interstate 80 is a known pipeline for the transportation of drugs between the states. No statistical evidence was introduced to the Court to prove this assertion. No statistical evidence was introduced indicating what percentage of the vehicles proceeding on Interstate 80 have drugs in them and of these vehicles containing drugs, which are being used for transportation of drugs in interstate commerce. The Court, however, in deciding this case, will assume that, since Interstate 80 is one of the major highways in interstate commerce, logic would compel the same conclusion when the commerce in question is drug trafficking.

While little evidence was adduced in this regard, the Court certainly accepts that the transportation of drugs and the use of drugs by individuals driving on our interstate highways constitutes a serious problem which needs to be addressed by law enforcement. No one can doubt the devastating effect of drugs on the society at large and the pitiful results gained by the present "war on drugs". Therefore, the Court has no question that a legitimate governmental interest of high importance is presented in the question of eliminating the flow of drugs on the interstate highways of the State of Nebraska.

While the Court recognizes the legitimate governmental interests raised by the desire to stem the flow of

drugs in the United States, no evidence was adduced as to the effectiveness of drug checkpoints in checking this flow of drugs, and specifically no evidence was adduced as to the effectiveness of the particular drug checkpoint used in this case. The Court was presented no evidence as to the total number of vehicles that proceeded through the checkpoint, the number of vehicles that were stopped at the checkpoint, the number of vehicles that were stopped and searched at the checkpoint, the number of vehicles that were stopped and searched and found to have drugs at the checkpoint, the number of vehicles in which the officers observed law violations but did not stop the vehicle, the number of vehicles where the officers made observations of "furtive" gestures but did not stop the vehicles, the number of vehicles in which the officers observed furtive gestures and law violations which resulted in a stop, search, and not finding drugs, etc.. No evidence was adduced in regard to a correlation between so called furtive gestures and the presence of drugs in a vehicle driven by an individual making furtive gestures. No evidence was adduced concerning the likelihood of an individual not having drugs in his or her car making gestures towards the glove compartment or toward the seat to obtain items of identification such as registration or license. It is in this vacuum that the Court has to balance the intrusion on the public by such a drug checkpoint.

Without adducing any evidence on the number of vehicles involved, the State would argue that the intrusion in this case is minimal since most of the vehicles were not stopped. The Court will address the issue of the randomness later in the opinion. However, it cannot be

forgotten that the checkpoint in question was set up on one of the busiest interstate highways in the United States. The travelers on this highway are in either intrastate or interstate travel with an expectation of reaching their destination at speeds of at least 65 miles per hour. Further, there is an expectation that the interstate system will provide swift and uninterrupted travel to those using it, and there certainly is an expectation that individuals will not be stopped unless they commit a law violation. It is obvious that Interstate 80 is not the same as the road in Saginaw County, Michigan, which was the situation in *Sitz*.

Even though not all vehicles were stopped, the intrusion upon the drivers on Interstate 80 has another component – that is the psychological intrusion which the Supreme Court considered in the random stops discussed in *Prouse* and fixed checkpoints discussed in *Martinez-Fuerte*. The Supreme Court in *Sitz* made light of the fright or annoyance caused by the intrusion of the non-fixed checkpoint stop. The State argues that the checkpoint causes less fear and surprise for the traveling public since they see that other vehicles are being stopped and visible signs of the officers authority. The dissent in *Sitz* discusses these issues.

> "A driver who discovers an unexpected checkpoint on a familiar local road will be startled and distressed. She may infer, correctly, that the checkpoint is not simply "business as usual," and may likewise infer, again correctly, that the police have made a discretionary decision to focus their law enforcement efforts upon her and others who pass the chosen point. This element of surprise is the most obvious distinction

> between the sobriety checkpoints permitted by today's majority and the interior border checkpoints approved by this Court in *Martinez-Fuerte*. The distinction casts immediate doubt upon the majority's argument, for *Martinez-Fuerte* is the only case in which we have upheld suspicionless seizures of motorists. But the difference between notice and surprise is only one of the important reasons for distinguishing between permanent and mobile checkpoints. With respect to the former, there is no room for discretion in either the timing or the location of the stop – it is a permanent part of the landscape." *Sitz*, 110 S.Ct. at 2492.

The dissent further points out that it is not only those who are guilty of crimes who have an elevated feeling of anxiety that arises at a checkpoint such as the one in *Sitz* or the one involved in the instant case.

> "These fears are not, as the Court would have it, solely the lot of the guilty. To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky. Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions. Moreover, those have found – by reason of prejudice of misfortune – that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior. Being stopped by the police is distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe." *Sitz*, 110 S.Ct. at 2493.

While the Court does not wish to over emphasize the psychological affect of the intrusion involved in this case, the court does not want to minimize the expectation of privacy that the citizens of this country rightly have come to rely upon in their everyday travels about the roads and highways of this country. Freedom from intrusion of any sort is not lightly to be set aside.

It also should be noted, that in the instant case, no driver could avoid the checkpoint as was the situation in *Martinez-Fuerte.* The very act of avoidance – making a U-turn, stopping, or pulling into the rest stop, was considered a furtive movement that may trigger a seizure of the vehicle and the driver.

Despite the holding of the United States Supreme Court in *Sitz,* the instant case is clearly distinguishable from it and *Martinez-Fuerte, Prouse* and the case cited by the State in its brief, *State of North Dakota v. Everson,* 474 N.W. 2d 695 (1991) In the instant case, not all vehicles were stopped and discretion was left to the officers in determining which vehicles could be stopped based on a nebulous definition of "furtive movements". Again, there was no evidence adduced showing that all vehicles that had drivers exhibiting "furtive movements" were stopped or that all vehicles committing minor traffic violations were stopped nor does Exhibit 1 set out clearly the responsibility of the officers at the narcotics checkpoint. The fact that one of the officers observed a minor violation, driving on the shoulder, does not vitiate the seizure. Here, the stop and seizure for that minor violation were clearly pre-textual for the carrying out of the narcotics checkpoint.

The State places great emphasis on the fact that this checkpoint was "planned" and "systematic". However, the evidence does not bear out that assertion, and there were no clear-cut restraints on officer discretion as to the stopping of individual vehicles. It is also obvious that this Court cannot fully resolve this issue of discretion without further evidence being adduced as to the number of vehicles being stopped, the reasons for the stop and the results emanating from such stops. The State also argues that it is significant that the plan was approved by State Patrol Headquarters. Even if the plan were approved by the Attorney General, that does not constitute an *imprimatur* which requires this Court's *nihil obstat*. The approval is only significant if the plan reins in unchecked discretion as to which vehicles are to be stopped. It did not do so in this case.

Therefore, the Court finds that the checkpoint and stop of the defendant's car do not pass constitutional muster even under the limiting view of *Sitz*.

Furthermore, this Court would be willing, as was the Michigan Appellate Court on the remand of *Sitz* from the United States Supreme Court, to apply state constitutional grounds to determine that the seizure was in violation of Article 1 Section 7 of the Nebraska constitution. See, *Sitz v. Michigan Department of State Police*, ___ N.W. 2d ___ (1992). The right of Nebraska citizens to be free from seizure on the over 450 miles of interstate highway within this State should not now be constrained simply because of an ideological shift on a United States Supreme Court that increasingly looks with disfavor on the safeguarding of individual rights.

In reaching the decision to sustain the Motion to Suppress in this case, the Court in no way means to convey the message that it does not feel that drugs are a serious problem which need to be dealt with. This court has consistently imposed stiff sentences in cases involving the distribution or possession of cocaine, and in doing so, has consistently pointed out the dangers to the very core of our society presented by the continuing use and distribution of such drugs.

It would be a simple thing to set aside procedural safeguards in order to combat this particularly pernicious evil. However, such action would constitute a surrender to that evil and a failure to recognize that the strength of this country lies in the rights guaranteed to all of its citizens.

The Court is also not unmindful of the arguments proposed by some that the vast majority of citizens would be willing to forego their individual rights and submit to a seizure and search of their vehicle in order to eliminate a drug trafficking problem within the United States. Obviously, there are not enough officers to conduct such seizures and searches so as to have an impact on the problem as it exists. But, moreover, we must always be reminded that constitutional guarantees are not subject to being set aside simply based on the views of the majority of the people on a particular issue at a particular moment.

Speaking of the seizure and search of automobiles involved in sobriety checkpoints, Mr. Justice Brennan stated:

> "Indeed, I would hazard a guess that today's opinion will be received favorably by a majority of our society, who would willingly suffer the minimal intrusion of a sobriety checkpoint stop in order to prevent drunk driving. But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis. 'The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some "balancing test" than its intrusion on individual privacy; it was designed in addition to grant individuals a zone of privacy whose protections could be breached only where the "reasonable" requirements of the probable cause standard were met. Moved by whatever momentary evil has aroused their fears, officials – perhaps even supported by a majority of citizens – may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of "the right to be let alone the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting)' *New Jersey v. T.L.O.*, 469 U.S. 325, 361-362, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Brennan, J., concurring in part and dissenting in part) (footnote omitted)". *Sitz*, 110 S.Ct. at 2490.

To paraphrase Mr. Justice Stewart in *Alameida-Sanchez*, we must resist the pressure of official expediency brought against the guarantees of the Fourth Amendment. It is not

that we respect the zeal of the State Patrol in curbing drugs any less, but we honor the Constitution more.

What separates us as a nation from all others is the steadfast application of constitutional guarantees, and the recognition that, in our society, freedom and liberty can only survive and thrive if we resist the temptation to erode constitutional guarantees and if we strive to ensure that reaction to the crisis of the moment will not lead to the disintegration of the Bill of Rights due to ideological caprice or willful indifference.

The Court finds that the Motion to Suppress should be sustained and that the State shall not be allowed to adduce at trial any physical evidence or observations obtained from the illegal seizure of the vehicle belonging to the Defendant. The State may file a notice no later than ten days from the filing of this order that it intends to seek review of this Order in the Appellate Court or Supreme Court.

So Ordered

/s/ John P. Murphy
John P. Murphy
District Judge

(Seal)

State of Nebraska, appellant, v. Douglas Kingsbury, appellee.

Filed September 1, 1992. No. A-92-403

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Kent D. Turnbull, Lincoln County Attorney, for appellant.

P. Stephen Potter for appellee.

D. Kirk Wolgamott for amicus curiae Nebraska Civil Liberties Union.

MILLER-LERMAN, Judge.

The State appeals the order of the district court granting appellee's motion to suppress the fruits of a vehicle search and seizure conducted on October 24, 1991. The search occurred as the result of a narcotics traffic checkpoint set up by the Nebraska State Patrol on Interstate 80, east of Sutherland, Nebraska. Whether or not a narcotics checkpoint of this nature is constitutionally reasonable is a question of first impression before this court.

The appeal of the trial court's ruling is pursuant to Neb. Rev. Stat. § 29-824 (Supp. 1991). "When reviewing the correctness of a trial court's ruling on a motion to suppress, an appellate court will not reweigh the evidence or resolve conflicts in the evidence but will uphold the trial court's findings of fact inherent in the court's ruling unless these facts are clearly erroneous." *State v. Pope*, 239 Neb. 1009, 1012, 480 N.W.2d 169, 172 (1992). "In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does

not reweigh evidence or resolve conflicts therein, but takes into consideration that the trial court has observed the witnesses testifying in regard to the motion to suppress." *Id.*

In a thoughtful 11-page opinion, which includes a recitation of the major U.S. Supreme Court border and checkpoint cases, which will not be repeated here, the trial court granted appellee's motion to suppress, concluding, inter alia, that based on the law and the facts, the search and seizure were constitutionally deficient. For the reasons recited below, I conclude that the checkpoint was not constitutional, nor was the seizure of appellee based on probable cause or a reasonable suspicion, supported by articulable facts, that criminal activity existed. See, *Michigan State Police Dept. v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L. Ed. 2d 412 (1990); *State v. Ryland*, 241 Neb. 74, ___ N.W.2d ___ (1992). The district court's order granting appellee's motion to suppress is affirmed.

A citizen has a right to be free from an unreasonable search and seizure, pursuant to U.S. Const. amends. IV and XIV and Neb. Const. art I, § 7. These rights apply to individuals in vehicles. *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). While the suggestion is increasingly being made that the breadth of the search and seizure protections afforded by the federal and state constitutions may not be coextensive, I find that the search and seizure in the instant case is unacceptable under both the federal and state constitutions and that I need not address the issue of the identity of federal and state protections. See, e.g., *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983) (White, J., concurring) (asserting that a state constitutional basis exists to determine the

validity of a search and seizure). See, also, *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991) (White, J., dissenting) (asserting that the Nebraska Constitution should be interpreted to continue to require the exclusion of confessions obtained by a direct or implied promise, however slight, in contrast to current U.S. Supreme Court cases interpreting Fourth Amendment rights under the U.S. Constitution); *State v. Church*, 538 So. 2d 993 (La. 1989) (holding that a roadblock violated Louisiana Constitution, even though it was permissible by federal standards); *State v. Koppel*, 127 N.H.286, 499 A.2d 977 (1985).

FACTS

Because the outcome of the instant case is fact dependent, the facts are related in some detail below. On October 24, 1991, the Nebraska State Patrol, in conjunction with a deputy Attorney General and the Lincoln County sheriff's office, established a narcotics checkpoint near the Sutherland rest area on Interstate 80. At the hearing on the motion to suppress, Officer Steven Evans of the Nebraska State Patrol testified that a written plan had been submitted to State Patrol headquarters in Lincoln and that the plan had been approved by the administrator of Field Services in the Traffic Division and the Investigative Services office. Officer Evans additionally testified that Interstate 80 "ha[d] been shown to be a traffic way for narcotics, large quantities, as well as small quantities." There was no evidence in the record concerning Interstate 80 serving as an alleged drug "pipeline" other than this testimony. According to Officer Evans, a narcotics checkpoint had been established on Interstate 80 near Kimball, Nebraska, in September 1991, and on the

basis of the unspecified results of that checkpoint, the State Patrol decided to establish the Sutherland checkpoint.

The Plan provided for (1) "Bivowac" [sic] housing for officers who were involved in the checkpoint and who had to stay overnight in connection with the operation; (2) 53 participants, consisting of 36 uniformed personnel, 13 investigators, and 4 administrative staff; (3) 3 observation posts located before the checkpoint, staffed by 4 officers in cruisers at each observation post; (4) 2 officers in the rest area to monitor trash cans and seize vehicles; (5) a cruiser positioned at the rest area "with red lights flashing"; (6) interdiction teams to chase down "turn arounds"; (7) an unmarked unit; (8) a "K-9" (dog) unit; and (9) a crime van at the checkpoint, to assist the officers flagging selected motorists in for inspections. Officer Evans testified that the troops were advised that they were to stop only those vehicles that had

> committed a traffic violation in their presence, all vehicles containing occupants that were committing law violations that were done in their presence, any vehicles that had turned around or otherwise were taking evasive action to avoid any drug checkpoint such as U-turns, illegal stops, pulling off, or driving below the minimum speed or such as this. Any vehicle that was containing an occupant who displayed a furtive conduct, which would be aimed at hiding some contraband or weapon.

At approximately 2 p.m. on October 24, 1991, Douglas Kingsbury was driving on interstate 80 when, according to his testimony, he noticed flashing lights and

approximately 50 law enforcement vehicles in a concentrated area. At the hearing on the motion to suppress, he testified that he was "intimidated and confused" and that, thinking it was a vehicle inspection point, he slowed down and began hunting for his registration. Kingsbury was flagged over into the checkpoint and subsequently arrested after officers detected a controlled substance lying in plain view on the floorboards of the passenger side of his car.

At the preliminary hearing conducted on December 5, 1991, Officer Gary Eng, who had been positioned in a surveillance van at the rest area, testified that he did not see Kingsbury violate any laws. Officer Eng testified, however, that he received a radio transmission from observation post No. 2 that Kingsbury had been observed "storing" something under the front seat and that he had made a similar observation. Officer Eng testified that the car "slowed down very irrationally, was now weaving within it's [sic] own lane."

At the hearing on the motion to suppress conducted on April 6, 1992, testimony was elicited from six officers. Officer David Elliott, who was located at observation post No. 3 and who maintained continuous surveillance of Kingsbury's vehicle from the first sign to the checkpoint, testified that he did not see Kingsbury's vehicle commit any traffic violations or evasive acts. Officers Tom Parker and Douglas Carmichael, who were located at the checkpoint and who had a continuous frontal view of Kingsbury's vehicle, watched Kingsbury come down the hill. Officer Parker flagged Kingsbury into the checkpoint. Officer Carmichael testified the vehicle was flagged over

because the driver had reportedly made suspicious movements toward the floorboards on the passenger side. Officers Parker and Carmichael both testified that they did not see Kingsbury violate any laws. Officer Parker testified that he had observed no furtive conduct. In contrast. Officer Eric Rice, who had been located in a position lateral to Kingsbury's vehicle, near observation post No. 2, testified that he had seen Kingsbury slowing, weaving in his lane, and pushing something under the passenger seat. Officer Dennis Leonard, who had also been located in a position lateral to Kingsbury's vehicle, at observation post No. 2, testified that he had observed Kingsbury slow to approximately 45 m.p.h. and drive approximately 1 to 2 feet onto the eastbound shoulder. Officer Leonard then radioed to Officer Elliott what he had seen.

After Kingsbury was flagged into the checkpoint, he was approached by two officers, one at the driver's door and the other on the passenger side. The officer on the passenger side noted drug paraphernalia on the floor of the passenger side and directed that the car door be opened. The parties do not dispute that if the stop and seizure of Kingsbury were constitutional, the seizure of the controlled substance from a position in plain view of the officers was permissible. See *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). See, also, *State v. Hoer*, 231 Neb. 336, 436 N.W.2d 179 (1989) (holding that if the officer's initial intrusion is lawful, the inadvertent discovery of immediately apparent contraband may be seized under the "plain view" doctrine). I express no opinion on the application of the plain view doctrine to the facts of this case. As stated above, Kingsbury was subsequently

arrested and charged with possession of a controlled substance.

Kingsbury filed a motion to suppress, asserting that the seizure violated his constitutional rights. The motion was granted on May 12, 1992. The State subsequently perfected this appeal. On appeal, the State concedes that a Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint, see *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976), but, nevertheless, argues that the checkpoint in this case was permissible on the authority of *Michigan State Police Dept. v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), in which a highway sobriety checkpoint was found constitutional. See, also, *State v. Everson*, 474 N.W.2d 695 (N.D. 1991) (holding that a checkpoint for controlled substances complied with the Fourth Amendment). The State further argues that even if the checkpoint violates the Fourth Amendment, the stop in this case was warranted because the officers had "specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion," brief for appellant at 14; *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); and *State v. Bowley*, 232 Neb. 771, 442 N.W.2d 215 (1989), and that the evidence of crime was in plain view and, therefore, was properly seized, *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992), and *State v. Brown*, 232 Neb. 224, 439 N.W.2d 792 (1989). Appellee argues that the checkpoint stop of his vehicle was unconstitutional and that, in any event, the seizure of his vehicle was not based on probable cause, see *Carroll v. United States*, 267 U.S. 132, 45 S. Ct.

280, 69 L. Ed. 543 (1925), a reasonable suspicion supported by specific articulable facts. see *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), or any recognized exception permitting the warrantless search of vehicles, see *State v. Neely*, 236 Neb. 527, 462 N.W.2d 105 (1990) (single-judge opinion holding that three exceptions exist to justify a warrantless search of vehicles, which include (1) a search incident to a lawful arrest of the occupant, (2) probable cause to believe a vehicle contains contraband, and (3) an inventory search pursuant to standard police procedure).

VALIDITY OF CHECKPOINT STOP AND SEIZURE UNDER *SITZ*

The State relies on *Sitz* as authority to validate the litigated checkpoint in general and, therefore, the stop and seizure of appellee in particular. In *Sitz*, the U.S. Supreme Court found that a sobriety checkpoint where every vehicle was stopped complied with the Fourth Amendment and that the evidence supported the conclusion that the checkpoint was minimally intrusive and was effective in reducing the number of drunk drivers on the road.

In *Sitz*, the U.S. Supreme Court expanded on *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), in which, based on fragments of previous cases, it was concluded that in circumstances where the seizure is less intrusive than a traditional arrest, a stop is constitutionally permissible if the balance between the public interest in the stop outweights the " 'individual's right to personal security free from arbitrary interference by law

officers.' " 443 U.S. at 50. In *Brown*, the defendant was merely walking in a high crime area and, after refusing to identify himself, was arrested. The Court in *Brown* found that the State failed to articulate any basis for suspecting Brown of misconduct, and, therefore, his seizure was an unreasonable violation of his rights to be free from the " 'arbitrary interference' " of police officers. 443 U.S. at 50. The legacy of *Brown* includes its endorsement of a balancing test between a governmental interest and an individual's right to personal security free from arbitrary interference by police. See, also, *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) (utilizing a balancing analysis in approving highway checkpoints for detecting illegal aliens).

A synthesis of *Sitz* shows that, where the balancing test is found or assumed to be applicable, in order for the checkpoint to be valid the State must demonstrate the following: (1) that the State has an important governmental interest in preventing a specific harm, (2) that the checkpoint is effective in advancing the governmental interest, and (3) that the degree of intrusion on individual motorists is minimal.

Governmental Interest.

With respect to the element of governmental interest, the State argues that the checkpoint was designed to reduce transportation of illegal drugs through the State of Nebraska. The record provides testimony by one police officer at the suppression hearing that Interstate 80 is a traffic way for drug couriers. That testimony includes reference to an episode on Interstate 80 near Kimball in

which, it may be inferred, individuals allegedly trafficking narcotics were arrested. Although the evidence of governmental interest was anecdotal, the trial court found it sufficient to support the conclusion that drug interdiction on Nebraska highways is an important governmental interest. I agree with the trial court's conclusion that "a legitimate governmental interest of high importance" has been adequately, if not elaborately, demonstrated, and proof of this element of the *Sitz* formula has been sustained by the State.

Effectiveness of Checkpoint.

With respect to the element of the effectiveness of the narcotics checkpoint, the State concedes that statistically significant evidence of effectiveness is lacking. The State argues, however, that data regarding effectiveness is not required.

In contrast, in its opinion, the trial court recited at length the kind of information which it would have found useful in evaluating the effectiveness of the checkpoint. The trial court noted that in this case it was presented with no evidence as to

> the total number of vehicles that proceeded through the checkpoint, the number of vehicles that were stopped at the checkpoint, the number of vehicles that were stopped and searched at the checkpoint, the number of vehicles that were stopped and searched and found to have drugs at the checkpoint, the number of vehicles in which the officers observed law violations but did not stop the vehicle, the number of vehicles

> where the officers made observations of "furtive" gestures but did not stop the vehicles, the number of vehicles in which the officers observed furtive gestures and law violations which resulted in a stop, search, and not finding drugs, etc.. No evidence was adduced in regard to a correlation between so called furtive gestures and the presence of drugs in a vehicle driven by an individual making furtive gestures. No evidence was adduced concerning the likelihood of an individual not having drugs in his or her car making gestures towards the glove compartment or toward the seat to obtain items of identification such as registration or license.

Given these lacunae, which are confirmed by a review of the record, the trial court found that the State had failed to demonstrate the effectiveness of the checkpoint.

Although I agree with the trial court's conclusions that effectiveness has been inadequately proven, no authority could be found for the "searching examination" of effectiveness suggested by the trial court, see *Michigan State Police Dept. v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), and I decline to impose the requirements recited by the trial court as necessary to a successful demonstration of effectiveness. Although I find no authority for requiring a mathematical formula to satisfy the requirement of demonstrated effectiveness of a particular checkpoint, I do find relevant authority for the propositions that a "complete picture of the effectiveness" of the checkpoint should be established by the record, see *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976), that a complete absence of

empirical data may be fatal to an attempt to prove effectiveness, see *Delaware v. Prouse,* 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), and that some numerical representation of effectiveness is sufficient, see *Michigan State Police Dept. v. Sitz, supra.*

I further observe that evidence of effectiveness of a checkpoint appears not to be limited in type to gross mathematical comparisons of traffic volume to arrests, but may also include descriptive information regarding the "degree to which the seizure advances the public interest." See *Brown v. Texas,* 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). In so stating, I am mindful that the methods selected for enforcing and achieving governmental interests remain with those government officials who must deal with the efficient use of limited resources. Accordingly, although I would not require the level of proof of effectiveness suggested by the trial court, I agree that there is insufficient evidence from which I can conclude that the checkpoint was effective. The effectiveness element of *Seitz* has not been adequately proven by the State.

Intrusion on Motorists.

With respect to the element of intrusion on individual motorists, the State argues that by both objective and subjective standards, the checkpoint was minimally intrusive. The State argues that the checkpoint stop is not intrusive because, by an objective standard, the detention was of minimal duration and intensity and because, by a subjective standard, adequate notice of the checkpoint

was provided by two yellow warning signs, and, therefore, no resulting fear or surprise was created in the motorists. In support of its contentions, the State argues that a fixed checkpoint, see *Martinez-Fuerte*, albeit temporary, *see Sitz*, is less intrusive than a roving stop, cf. *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973), and that because the checkpoint was preceded by visible signs, a motorist would not be surprised by a stop. In contrast, appellee argues that the checkpoint was highly intrusive, indeed frightening, and, thus, not valid under *Sitz*, *Prouse*, and *Martinez Fuerte*.

Appellee notes, and the record demonstrates, that considerable enforcement resources were dedicated to the checkpoint. Appellee argues that an encounter at a checkpoint adorned with a high number of police cruisers with lights flashing, armed personnel, signage, dogs, and other indicia of the war on drugs would startle a motorist traveling on Interstate 80, see *Michigan State Police Dept. v. Sitz*, *supra* (Stevens, J., dissenting), and intimidate and frighten a motorist singled out for an inspection, who otherwise would have an expectation of privacy, see *Delaware v. Prouse*, *supra*.

In resolving the issue of intrusion, the trial court acknowledged that there was a psychological effect to the intrusion in this case. Although I express no view on the objective intrusion involved in this case, for lack of evidence, I agree with the trial court that the subjective intrusion is unacceptable. Based on the record and the law, I conclude that the intrusion presented in the instant case violates the standard established under *Sitz* and predecessor cases. Here, not every car was stopped.

Additionally, due to the lack of off ramps or the availability of a legal U-turn, every car which passed the narcotics checkpoint warning sign would invariably encounter the checkpoint and subsequently face the possibility, and seemingly arbitrary intrusion, of a seizure. The only detour from proceeding directly along Interstate 80 to the checkpoint, after the appearance of the first narcotics checkpoint sign, was a deviation to the rest area, which was staffed with police personnel authorized by the checkpoint plan to "film and apprehend" individuals entering the rest area to dispose of illegal substances.

I am especially influenced by the fact that in *Sitz*, all vehicles were stopped at the sobriety checkpoint, whereas in the instant case only some vehicles were stopped, and those stops were at the field officers' discretion. See, also, *State v. Everson*, 474 N.W.2d 695 (N.D. 1991). I observe that a checkpoint is not unconstitutional solely because the plan fails to stop every car, and I acknowledge that a plan stopping vehicles pursuant to a numeric system, e.g. stopping every other or every fourth car, thereby reducing discretion, can be permissible. See, *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (Blackmun, J., concurring); *State v. Guidry*, 544 So. 2d 634 (La. App. 1989) (holding that sobriety checkpoint which stopped every third vehicle passed Constitutional muster under the Fourth Amendment to U.S. Constitution, but was invalid under the Louisiana Constitution); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984) (holding that the constitutionality of a roadblock was not impaired by the fact that all or every third or fourth vehicle would be stopped based on the level of traffic congestion). Where all vehicles are

stopped, although still the subject of unwanted attention, the motorist need not suffer the degree of anxiety associated with being singled out by law enforcement officers. As Justice Stevens observed in his dissent to *Sitz*, a checkpoint stop causes some degree of fear in the motorist, and "[t]hese fears are not . . . solely the lot of the guilty. . . . To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky." *Michigan State Police Dept. v. Sitz*, 496 U.S. 444, 465, 110 S.Ct.2481, 110 L. Ed 2d 412 (1990).

In the instant case, the State notes that the stop was made pursuant to guidelines established at the policymaking level of law enforcement. The State argues that nonfield officers specified the location of the checkpoint on a busy interstate highway and provided the field officers with a plan and that, therefore, the officers who stopped motorists did not have unfettered discretion. The State claims that based on these facts, the potential for an arbitrary intrusion is minimized. Although these factors distinguish this stop from the roving patrols operating at night on seldom-traveled roads, which the U.S. Supreme Court found unacceptable, see *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975), and the transitory checkpoint in which field officers operate without any standards, which the Nebraska Supreme Court found unacceptable, see *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), they do not eliminate the subjective intrusiveness experienced by a motorist under the facts of this case. I conclude that under all the facts of this case, including guidelines which lack specificity and a plan pursuant to which not all vehicles are stopped, nor are they stopped in a systematic pattern, the intrusion is

unacceptable under *Sitz* and that the checkpoint violates constitutional standards.

WARRANTLESS SEIZURE

Because I have concluded that the seizure pursuant solely to the checkpoint plan is constitutionally impermissible, I will examine the validity of the stop pursuant to the recognized exceptions which permit warrantless seizures of persons in vehicles.

In arguing the issue of the constitutionality of the checkpoint, the State concedes, and I agree, that a "Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint." See *Michigan State Police Dept. v. Sitz*, 496 U.S. at 450. See, also, *Delaware v. Prouse, supra*. However, in arguing the issue of the constitutionality of the individual stop of Kingsbury unrelated to the checkpoint, the State claims that the detention of Kingsbury was acceptable under the cases permitting investigatory stops. The State contends, that Kingsbury was engaging in, or about to engage in, criminal activity which would justify a "*Terry* stop." See, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Neb. Rev. Stat. § 29-829 (Reissue 1989).

In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court does not reweigh the evidence or resolve conflicts in the evidence, but recognizes that the trial court is the trier of fact and takes into consideration that the trial court has observed the witnesses testifying in regard to the motion. *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992); *State v. Melton*, 239 Neb. 790, 478 N.W.2d 341

(1992). The trial court found that Kingsbury's stop and seizure on the basis of only one officer's observation that Kingsbury committed a traffic violation, driving on the shoulder, was "clearly pre-textual for the carrying out of the narcotics checkpoint." In essence, the trial court found that the stop and seizure lacked probable cause; that the officers were without reasonable suspicion, supported by articulable facts; that Kingsbury had been or was about to be engaged in criminal behavior; and furthermore, that no traffic violation had been observed. After a thorough review of the record, I cannot say that the trial court's findings were clearly erroneous, and therefore, the trial court's ruling that no legitimate individualized basis for stopping Kingsbury existed is affirmed.

The Nebraska Supreme Court in *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), reviewed the validity of a sobriety checkpoint. Under *Crom*, a motorist detained at a checkpoint is seized. The Nebraska Supreme Court held in *Crom* that the defendant had been "unreasonably seized in violation of the fourth amendment to the U.S. Constitution" because, inter alia, the checkpoint had been established and conducted at the unfettered discretion of field officers. *Id.* at 277, 383 N.W.2d at 463. In his concurring opinion, Chief Justice Krivosha quoted *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), which stated that a "'seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.'" *Crom*, 222 Neb. at 283, 383 N.W.2d at

467. See, also, *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989) (holding that since the checkpoint was unconstitutional, the defendant was unreasonably seized in violation of the Fourth Amendment to the U.S. Constitution, and, therefore, the evidence, consisting of a pickup truck, had to be suppressed).

In a line of cases unrelated to checkpoints, but dealing with stops of individual drivers, the Nebraska Supreme Court has held that the police can "constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment." *State v. Ryland*, 241 Neb. 74, 78, ___N.W.2d ___, ___(1992). See, also, *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992); *State v. Bowley*, 232 Neb. 771, 442 N.W.2d 215 (1989); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987) (holding that an officer's stop of a defendant based on the officer's observation, at close range, of the defendant weaving within his lane is constitutional because it is based on the officer's justifiable belief that the driver is under the influence of alcohol in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990)). The cases demonstrate that an investigatory stop followed by an officer's observation of a defendant can give rise to probable cause justifying the ultimate arrest of the defendant. *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991) (holding that informant's tip and subsequent observation of defendant justified *Terry* stop, which escalated to probable cause for arrest when defendant fled instead of stopping his car); *State v. Gerjevic*, 236 Neb. 793, 463 N.W.2d 914 (1990) (single-judge opinion

holding that initial stop to seek permission from defendant to search car for drugs, which was preceded by surveillance including officer's orchestrated drug buy, escalated to probable cause when the defendant tried to leave her car, justifying a warrantless search and subsequent arrest of the defendant). These cases also demonstrate that a stop of a vehicle, accompanied by facts causing an individual to believe that he or she is not free to leave, is nevertheless a seizure which requires the officer to have some level of objective justification. *Ryland, supra; State v. Twohig,* 238 Neb. 92,469 N.W.2d 344(1991)

I am inclined to follow the Nebraska Supreme Court's statements recognizing that the stop of a vehicle at a checkpoint is a seizure and that, in the absence of a checkpoint and depending on the facts, an individual stop can also be a seizure, requiring probable cause. Given the conclusion that Kingsbury was the subject of a seizure, the State, in this case, must show probable cause, frequently described as an indication that the officers had knowledge which was based on reasonably trustworthy information which would justify a prudent belief that Kingsbury was committing or had committed a crime. See *State v. Thomas,* 240 Neb. 545, 483 N.W.2d 527 (1992). Alternatively, pursuant to the State's articulation, the officers should produce evidence sufficient to justify a *Terry* stop, which is described as evidence indicating that the officers had formed a "'reasonable suspicion, supported by articulable facts, that criminal activity exist[ed]'" or that the officers were faced with the threat of violence. See *id* at 554, 483 N.W.2d at 534. See, also, *Ryland,* 241 Neb. at 79, ___N.W.2d at___(holding that the seizure was

impermissible "[b]ecause the deputy had no probable cause to stop [defendant] and because the deputy had no reasonable suspicion of the existence of criminal activity. . . . "); *State v. Vermuele*, 234 Neb. 973, 453 N.W.2d 441 (1990) (single-judge opinion holding that because of prior investigations, the police had probable cause to believe the defendant was about to commit a felony, and, therefore, the initial stop of defendant in his own car was valid); *State v. Zemunski and Whiteley*, 228 Neb. 536, 423 N.W.2d 443 (1988) (single-judge opinion holding that the officers' stop of the defendants in their car, as burglary suspects, was not based on any indication that the defendants were in possession of a weapon, which would have justified a protective seizure and search pursuant to *Terry v. Ohio*, 392 U.S. 1, 88S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *State v. Holman*, 221 Neb. 730, 735, 380 N.W.2d 304, 308 (1986) (holding that the officer who observed the defendant having four large truck tires hanging out of her trunk at 12:45 a.m., having a front license plate missing, and running two stop signs after the officer turned on his cruiser's lights had probable cause to associate the tires with criminal activity, so that a seizure for "further investigation" was lawful); *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983).

In order to determine if the officers in the instant case had probable cause, see *Thomas*, and/or a reasonable suspicion, supported by articulable facts, that criminal activity existed, see *Ryland*, to justify a seizure of Kingsbury, I must review the testimony. After a thorough review of the record, I note that the testimony of the officers was inconsistent. Three of the officers who observed Kingsbury testified that they did not see that

Kingsbury violate any traffic laws, nor was testimony elicited that Kingsbury was weaving on the road. Officer Elliott, who testified that he did not see any violations, was positioned at observation post No. 3, from which he kept Kingsbury's vehicle under constant surveillance from the first sign through the checkpoint. Officers Parker and Carmichael, who testified that they did not see any violations, were both stationed at the checkpoint and could see Kingsbury's vehicle from a frontal perspective. In contrast, three officers testified that from a lateral observation viewpoint, they saw Kingsbury weave in his lane after passing the first sign.

I note that there was ample testimony that Kingsbury was flagged over primarily because he made "suspicious movements" toward the floorboards on the passenger side. In the instant case, the trial court noted that the litigated plan authorized a stop "based on a nebulous definition of 'furtive movements'" and, therefore, the officers in the field were granted broad discretion in determining which vehicles could be stopped. Indeed, as the trial court observed, no evidence was presented by the State showing that all drivers making "furtive movements" were stopped or that all vehicles committing minor traffic violations were stopped. Officer Evans, who played a part in establishing the checkpoint, testified on cross-examination that it would not be unusual to see people check their glove compartments or make some movement inside the vehicle prior to a vehicle equipment inspection stop. Additionally, Kingsbury testified that he though the stop was because police wanted to check his registration and that he had leaned over to retrieve it out of his glove compartment.

The trial judge observed the witnesses and determined that the stop was not based on the allegation that Kingsbury had committed a traffic violation. I agree with the trial court that the officers flagged Kingsbury over pursuant to the State Patrol's plan listing "fertive [sic] movements" as a reason to isolate a driver form normal traffic. Inherent in the trial court's finding is the conclusion, with which I agree, that the furtive movement suggestion, even if believed, did not amount to probable cause. I recognize that there is Nebraska case law suggesting that furtive movements or gestures by a suspect, coupled with the existence of prior reliable information inferring that the suspect was engaged in criminal activity, could be sufficient to provide probable cause for a warrantless search and seizure. See, *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981); *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979), *cert. denied* 444 U.S. 982, 100 S. Ct. 485, 62 L. Ed. 2d 409; Annot., 45 A.L.R. 3d 581 (1972). However, in the case at bar, no prior reliable information inferring criminal conduct on the part of Kingsbury was presented by the State.

Even if the detention of Kingsbury was characterized as an "investigatory stop" rather than the type of seizure requiring probable cause, given the totality of circumstances, including but not limited to the checkpoint mileu, it would be difficult to characterize the stop of Kingsbury as a garden-variety investigatory stop. I believe that the "furtive movements" standard did not require the field officers to conceptualize or develop a "reasonable suspicion, supported by articulable facts, that criminal activity" existed, such as would justify a *Terry* stop of Kingsbury. See, *Ryland*, 241 Neb. at 78,

___N.W.2d at___; *State v. Pope*, 239 Neb. 1009, 480 N.W.2d 169 (1992). Nor does the standard pursuant to the plan require the field officer to determine that the defendant could be in possession of a weapon. See *State v. Zemunski and Whiteley*, 228 Neb. 536, 423 N.W.2d 443 (1988) (single-judge opinion). See, also, § 29-829. Contrary to the State's suggestion, the evidence does not support the conclusion that Kingsbury was engaging in or about to engage in criminal activity, which would justify a *Terry* stop. See *State v. Ryland, supra*. See, also, *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). Accordingly, I conclude that were the stop of Kingsbury portrayed as merely investigatory, under all the facts, the evidence does not support the intrusion.

A reviewing court will not reweigh the evidence or resolve conflicts in the evidence. *State v. Ellington*, 1 NCA 668 (1992). I agree with the trial court that the State did not produce evidence sufficient to support the assertion that the officers had a reasonable suspicion, supported by articulable facts, that criminal activity existed, see *State v. Ryland, supra*, nor probable cause, see *State v. Thomas, supra*, which would have justified a seizure of Kingsbury. Articulable facts are the antidote to unfettered discretion and are notably absent in the State's evidence. After reviewing the record, I hold that the trial court's findings of fact were not clearly erroneous and that the seizure does not meet constitutional standards.

SUMMARY

I find that the narcotics checkpoint in this case was constitutionally impermissible and that the seizure pursuant thereto was invalid. I further find that an individualized basis for the seizure was inadequately demonstrated and that the seizure was, therefore, unacceptable under the recognized exceptions permitting warrantless seizures or investigatory stops of vehicles. Although the State's objective of reducing drug trafficking on Interstate 80 is laudable, "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." See *Boyd v. United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746 (1886). The order of the trial court granting the motion to suppress is affirmed.

AFFIRMED

SUPREME COURT OF NEBRASKA
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

September 23, 1992

James A. Elworth
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: A-92-0403, State v. Douglas Kingsbury

Pet Appellant for Further Review & Brf **filed** 09/10/92 **has been reviewed by the court and the following order entered:** Petition of appellant for further review dismissed for lack of jurisdiction.

Respectfully,

CLERK OF THE SUPREME COURT

United States Constitution, Amendment Four; Nebraska Constitution, Article I, Section Seven:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

United States Constitution, Amendment Fourteen, Section One:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT #1

Date: October 24, 1991

Location: Near the Sutherland interchange, where signs will be located, actual check will be east of the Sutherland rest area.

Housing: Stockman Inn, North Platte, 534-3630, or 1-800-624-4643 Attn: Shirley Roath

Commanding officer: Capt. H. S. Corns

Reservations have been made at the Stockman Inn, for the evening of the 23rd.

Schedule: October 24, 1991

0800-0900 Briefing at Stockman Inn in lounge.
0930-1000 Walk area from the Sutherland interchange to vehicle check site.
1000-1600 Actual check

Department of Roads will be contacted to erect the signs and to mow the area between the Sutherland interchange and the vehicle check site.

Personnel:

Troop E will send	10 Uniform	4 Investigators	2 Administrative	
Troop D will send	20 Uniform	8 Investigators	2 Administrative	
K-9 units	2			
Lincoln Co. Deputies	4	1 possibly		
	36	13	4	53/Total

Lt. Evans would like to request the Carrier enforcement have three officers at the vehicle check site and at least one portable unit patroling highway 30.

The officers will be broken down into three man teams. An attempt will be made to have at least one uniform, one investigator on each team. The Lincoln county deputies will also be dividend evenly among the officers.

It is tentatively being considered to have eight spotters. They will be located at a position, where they can observe the distance between the sign and where the actual stop takes place.

County attorney Kent Turnbull has been notified and is very enthused about the idea. Capt. Corns has indicated that legal counsel form the attorney general's office will also be at the location.

Lt. Liebig has indicated that he will have plain clothes officers at the Sutherland rest area who will film and apprehend those turning off into the rest area to dispose of any illegal substances. Lt. Liebig has also assigned Sgt. Elliott to be at the site to take control of evidence. It will be stressed that small infractions will be handled by uniform personnel. Those cases involving a large amount of drugs or that will require a great deal of time will be turned over to investigators.

Communications will be notified so that they can have sufficent help. Lt. Liebig is also looking into getting the portable repeater set up and used. Other equipment that will be necessary will be binoculars, extra batteries, evidence envelopes, consent forms, and a wrecker notified in advance that there need may be needed.

The actual process starts with the spotters observing furtive movements, calling that vehicle down to the flagging person, who in turn assigns the vehicle to a team, which investigates those movements.

TROOPS D & E NARCOTICS SELECTIVE

OCTOBER 24, 1991 1000 - 1600

SUTHERLAND REST AREA

ASSIGNMENTS

OBSERVATION POST #1 - Ruiz #49*, Kendall #364, Haseloh #99, McDonald #9159 (WING)

OBSERVATION POST #2 - Leonard #130*, Krzyzanowski #400, Rice #194, Campbell #248 (WING)

OBSERVATION POST #3 - Elliott #147*, Eng #117, Rowedder #246 (WING/ FUTURE 1)

* OFFICERS RESPONSIBLE FOR RADIO TRAFFIC TO AND FROM THEIR RESPECTIVE TEAM

TEAMS:

1.	Benzel	#	25
	Nutt	#	239*
	Ahrens	#	33
2.	Blausey	#	7
	Veal	#	322*
	Sweet	#	91512
3.	Brower	#	27
	Deckert	#	71*
	Bade	#	91519
4.	Gusman	#	195
	Mashek	#	360*
	Dailey	#	91521

5.	Dodson	#	153
	Rose	#	374*
	Rogers	#	441
6.	Winn	#	41
	Yonkey	#	18*
	Carmichael	#	51
7.	Greeley	#	95
	Colling	#	94*
	Balthazor	#	433
8.	Hamer	#	158
	Redinger	#	398*
	Hunter	#	174
9.	Shasky	#	445
	Livengood	#	347*
	O'Neal	#	437
10.	Pleiss	#	444

– Unit stopped at rest area with red lights and flashers going. (Rotate into Team 6 with #41)

- CRIME VAN WILL BE AT THE CHECKPOINT FOR A TEMPORARY EVIDENCE STORAGE FACILITY (#147 INFO AT BRIEFING)

-TROOP D INTERDICTION TEAM} WILLIAMS #183, WILSON #237, KUHN #268 DOING INTERDICTION WORK BETWEEN M.P. 157 AND 162 - CHASE DOWN, TURN AROUNDS, ETC. (RUN ON NSP BASE, CHECK U.S. 30 PERIODICALLY FOR TRAFFIC)

- ROBINSON #309 IN UNMARKED UNIT WORKING AROUND THE SUTHERLAND INTERCHANGE FOR TURN AROUNDS AND C.B. TRAFFIC (CHECK U.S. 30 PERIODICALLY)

-BUCK #216 AT SUTHERLAND INTERCHANGE MONITORING TRAFFIC IN AND OUT OF BUSINESSES

-EVANS #159 AND PARKER #331 WILL FLAG IN VEHICLES AND MAKE ASSIGNMENTS (ON FUTURE 1, GO 10-98 SO WE KNOW YOU ARE AVAILABLE)

-IF YOU NEED TO RUN A 10-29, 10-60, 10-39, ETC., GO TO THE NSP BASE AND BACK TO FUTURE 1 WHEN CONTACT COMPLETED

-ALL RADIOS "OFF" SCAN

-CARRIER ENFORCEMENT OFFICERS WILL ASSIST WITH FLAGGING TRAFFIC AND HANDLE TRUCKS THAT ARE STOPPED

-MESSERSMITH #270 AND LARSON #105 WILL BE IN THE REST AREA KEEPING THE TRASH CANS CLEANED OUT

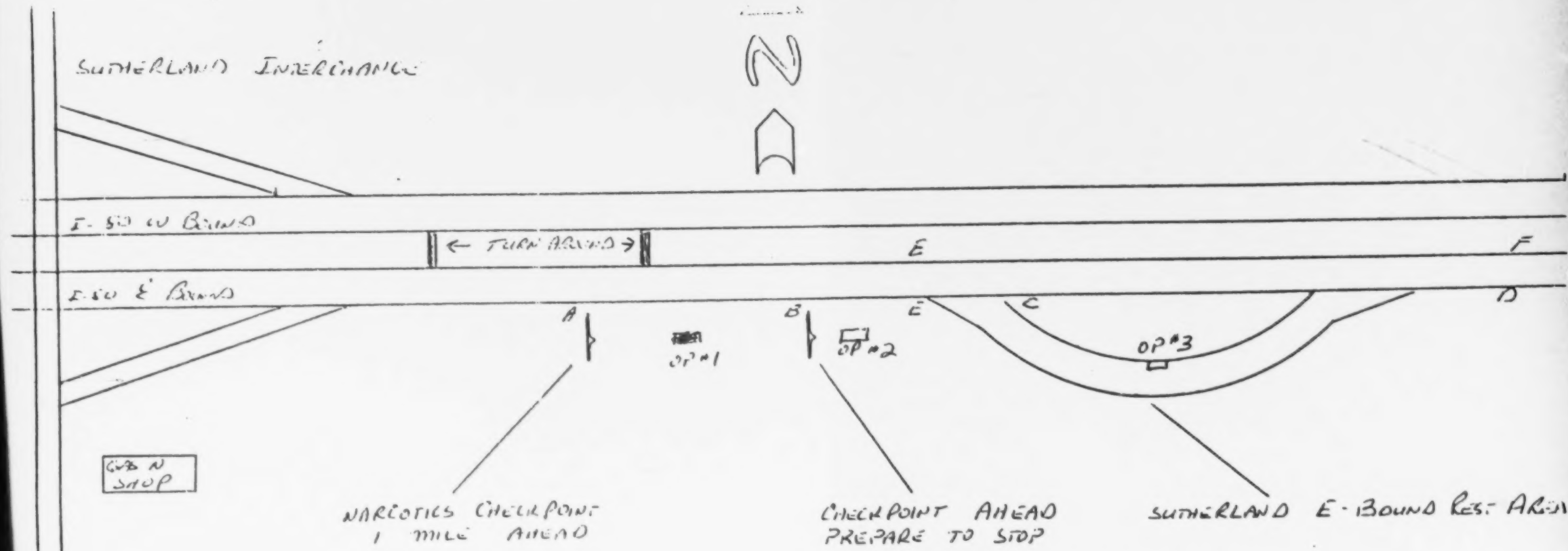
-WE ONLY HAVE ONE DOG, SO REQUESTS FOR K-9 GO THROUGH EVANS #159 OR PARKER #331

-REPORTS NEED TO BE DONE BEFORE LEAVING. EVANS #159 HAS A BOX OF REPORT FORMS IN THE BLAZER. IF POSSIBLE, HAVE TROOP D OFFICER BE THE CASE OFFICER

-IF YOU HAVE ANY RECOMMENDATIONS FOLLOWING THIS CHECK, PLEASE LET US KNOW

-MOST IMPORTANT - **BE CAREFUL!!!**

SVE:dlh



A-B SIGNS
C PATROL UNIT WITH LIGHTS ON (#440)
D STOPPING AREA
E PARK EMPTY PATROL UNITS
F CRIME VAN - EVIDENCE STORAGE